

**(1983) 09 CAL CK 0021**

**Calcutta High Court**

**Case No:** Criminal App. No. 8 of 1977

Nirmal Karmakar and Others

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision:** Sept. 27, 1983

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 11, 34
- Penal Code, 1860 (IPC) - Section 304, 34

**Citation:** 88 CWN 150

**Hon'ble Judges:** J.N. Chaudhuri, J; B.C. Chakrabarti, J

**Bench:** Division Bench

**Advocate:** Sudhir Gopal Poddar and Murari Mohan Ghosh, for the Appellant; Arun Kumar Mukherjee, for the Respondent

**Final Decision:** Allowed

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**Judgement**

B.C. Chakrabarti, J.

This is an appeal against an order of conviction u/s 304 Part II read with Section 34 of the Indian Penal Code. 9 accused persons were put on trial out of whom two namely Mukhlal Singh and Bhulu Dutta have been acquitted. The remaining 7, the appellants before us have been found guilty and sentenced to suffer rigorous imprisonment for 4 years each. The prosecution case in brief is as follows :-

The victim Sankar is the brother of the informant Smt. Tarak Biswas (P.W. 1). At the relevant time i.e. in October, 1974 victim was residing with the informant at village Madanpur, P.S. Chakdah in the District of Nadia. On the early morning of 20.10.74 appellant No. 1 Nirmal Karmakar and one Sudeb came to the house of the informant and called Sankar. Sankar was a day labourer. He was called from the house on the pretext of harvesting paddy. Sankar went away with them. The informant thereafter left for her place of work at the house of one Prafulla Ganguli.

She worked there as a maid servant. At about 10-30 a.m. her son Tapas came to Prafulla Babu's house and informed her that Sankar had been assaulted by Ramlal, Mahadeb, Mukhlal, Rajen, Bhulu, Sadhan, Bhombal, Nirmal, Sudeb and Bhim. She at once came to her house and saw Sankar lying in a seriously injured condition with bleeding injuries. Sankar could hardly speak and yet in pain he stated that he had been assaulted by the aforesaid persons excluding Sudeb. The accused Nirmal was also there at the house amongst the crowd which had assembled there and he called a Doctor (P.W. 6). The Doctor gave some medicines but Sankar died shortly thereafter.

2. After that the informant came to the police station and lodged the FIR at about 1.30 p.m. against 8 named accused persons and others. P.W. 9 an S.I. of Police recorded the FIR Ext. 1. P.W. 10 took up investigation and after completion of investigation submitted charge sheet against the 9 accused persons.

3. The prosecution examined as many as 11 witnesses. The defence did not adduce any evidence either oral or documentary. The defence case as it appears from the trend of cross-examination and the statement of the accused persons u/s 313 Cr. P.C. is that Sankar was not at the house of PW 1 on the night previous to the occurrence, that he was not called therefrom in the early morning, that he was a habitual burglar and that he might have been assaulted by some unknown persons on the previous night. It is also the defence case that the accused persons had repeatedly warned Sankar for mending his habits and that was why they have been falsely implicated. In regard to accused Mukhlal and Rajen it was suggested that there was a dispute between the parties over their boundaries.

4. P.W. 1 is the informant herself. P.W. 2 Tapas is the son of the PW 1. PW 3 Pipasa is the daughter of PW 1. PW 4 Gita Rani is an aunt of PW 1 PW 5 Bhuvan Sankar is the father of one Manindra who was also alleged to have been assaulted along with Sankar on suspicion of theft PW 6 is the Doctor, Durga Prasad Chatterjee who examined the injured Sankar and prescribed some medicines. P. Ws. 7 and 8 are two constables P.W. 9 is an S.I. of police who recorded the F.I.R. and P.W. 10 investigated into the case. P.W. 11 is the Post mortem Doctor whose evidence reveals that the victim was manhandled by more than one person, resulting in rupture of the liver and injuries on other parts of the body. In his opinion the injuries were homicidal and anti-mortem. These are all the witnesses to the case.

5. Upon a consideration of the evidence the learned Judge in the Court below found the 7 appellants guilty as aforesaid, but acquitted Mukhlal and Bhulu Dutta, principally upon a consideration that their names were not disclosed in the F.I.R.

6. Mr. Poddar appearing on behalf of the appellants contended that there has been a shifting of the place of occurrence that the natural witnesses are not forthcoming, that the only alleged eye witness, namely, P.W. 2 is not a truthful witness, that the evidence of oral dying declaration is thoroughly untrustworthy and that the

evidence being of an omnibus character it is unsafe to rely on the same. It was complained that Manindra who was alleged to have been called in the same fashion as Sankar and also assaulted has not been examined as a witness. A question was posed as to why no charge in regard to the alleged assault on Mohindra was framed if the prosecution story was true. Finally it was contended that even if Nirmal and Sudeb were proved to have called the victim on the early morning of the date of occurrence there was no evidence of a preconcert amongst all the accused persons so that they could be held vicariously liable for the ultimate end, namely the death of Sankar.

7. Learned Advocate for the State drew our attention to the fact that there has really been no shifting of the place of occurrence as alleged. The contention on behalf of the appellants is that the place of occurrence as noted in the F.I.R. is Gangulipara of village Madanpur whereas the evidence indicates as if the assault took place at Malipara. It is true that in the formal portion of the F.I.R. which was obviously filed in by P.W. 9 the place of occurrence is noted as Gangulipara. But in the body of the F.I.R. which really is the statement of P.W. 1 it is clearly stated that Nirmal and Sudeb called Sankar and Monindra to Malipara and there assaulted them both with iron rods on different parts of their body while asking where the stolen articles have been kept. It is thus clear that according to the F.I.R. the alleged place of occurrence is not Gangulipara but Malipara. Consequently the contention that the place of occurrence has been shifted cannot be accepted.

8. In regard to the incident the only material witness is P.W. 2. P.W. 1 is witness to the fact that Sankar was called by appellant Nirmal and Sudeb on the pretext of harvesting paddy. She was later informed by P.W. 2 of the occurrence and on coming to the house she found Sankar in a precarious state. She also stated that Sankar himself gave out the names of his assailants. She has also stated that Durga Doctor (P.W. 6) was also told on his enquiry as to how the victim came by the injuries. She has qualified her statement by saying that Sankar might have omitted to mention one or two names to the Doctor.

9. P.W. 2 says that Nirmal and Sudeb called Sankar in the early morning for harvesting paddy. At about 9 or 10 a.m. while he was going to the field with the tiffin for Sankar he came to hear from a girl from Bangladesh that Sankar was being severely assaulted at Malipara. He at once rushed to that place and found Sankar being assaulted by Mukhlal, Sudeb, Rajen, Bhulu, Ramlal, Sadhan, Mahadeb, Bhim, Bhombal and Nirmal. After sometime Sankar was brought to their house but he could not say who actually brought him. He then went to call his mother (P.W. 1) and came back along with his mother. According to this witness P.W. 1 made some enquiries from Sankar which the latter answered. It is also his evidence that the last words uttered by Sankar were "Mukhlaler Janne Janta Galo". It is also his evidence that he was interrogated on the following day when he went to the police station with his father. P.W. 3 is the sister of P.W. 2. Her evidence is that on the enquiry by

her mother Sankar said that he was assaulted by Nirmal, Bhombal, Sudeb, Bhulu and Sadhan. These were the only names she remembered. From her cross-examination it appears that none of the neighbourhood came to their house although some persons about 80 in number of far off places came. She also says that the accused Nirmal washed the wound of Sankar with tepid water. It is also her evidence that Mukhlal was found hitting Sankar with his shoes. But she did not speak of this to anybody.

10. P.W. 4 Gita Rani is an younger sister of P.W. 1. She says that Nirmal, Sudeb, Mukhlal, Rajen and 4-5 others carried Sankar to the house of P.W. 1 in an injured state. She further says that on the enquiry by P.W. 1 Sankar gave out that Sudeb, Nirmal, Mukhlal, Rajen and some others whose names she could not recollect had assaulted him. It transpires from her cross-examination that besides naming the assailants Shankar further stated that he was going to die because of Mukhlal. It, however, appears that she had not stated this to the I.O.

11. P.W. 5 Bhuban Sarkar is the father of the other victim Monindra. According to the F.I.R. Monindra was called in the same fashion as Sankar and was also assaulted. P.W. 5 says that Monindra is missing for the last two years and that he was not found after he was assaulted. In the same breath he says that seeing him bodily injured he called a doctor. Although in chief he says that Monindra was not found after he was assaulted and that he is missing for the last two years. It appears from his cross-examination that Monindra had left for Assam after the incident. He heard of the names of Monindra's assailant 3/4 days after the occurrence.

12. P.W. 6 is the Doctor. He says that on October 20, 1974 he went to the house of P.W. 5 and found his son seriously injured. After treating him the witness came back home and thereafter accused Nirmal and Sudeb asked him to examine another patient and they took him to a nearby house. He found the patient named Sankar with several injuries on his person. Seeing his condition serious, he advised the patient to be removed to hospital and also prescribed some medicines.

13. He does not claim to have enquired of Sankar or anybody else as to how Sankar came to receive those injuries, although other witnesses have said that Sankar gave out the names to the Doctor and that too on the enquiry made by the Doctor. These are the principal witnesses in the case. It is clear upon the evidence that Sankar was assaulted severely by some persons. The evidence suggests as if P.W. 2 on getting the information went to Malipara and saw the actual assault. It is further the prosecution evidence that Sankar himself gave out the names of his assailant and added further that it was due to Mukhlal that he was going to die. It is significant that none of the local residents is coming to depose. On the contrary the evidence is that the local people did not even come to the house of P.W. 1. That seems to be rather unusual and unnatural. It seems that local people were excluded possibly to explain the absence of any such persons figuring as a prosecution witness. PW 2 who is most important witness says that while he was going to the fields with the

tiffin for Sankar he was informed by a girl of Bangladesh about the assault on Sankar. PW 3 however, says that his brother, meaning thereby PW 2 was in the house when they got the information of assault. In saying so PW 3 contradicts PW 2. This apart PW 2 does not even name who that girl was, who gave him the information. Apparently he knew her but she is not examined as witness. This apart PW 2 is positive in his assertion that he was examined by the I.O. on the following day at the police station where he went along with his father. The I.O. however, would have believed that he examined PW 2 on the day of occurrence and at his house. This being the state of evidence the testimony of P W 2 is rendered doubtful.

14. The conduct of at least one of the applicants, namely, Nirmal appears to be inconsistent with the prosecution story. Admittedly he called the Doctor. Admittedly he was dressing the wounds of the victim. Learned Advocate for the State contended that Nirmal might have done all these out of a sense of guilt for having overdone in the matter of assaulting Sankar. We might have accepted such theory as possible but for the fact that the name of Nirmal according to the prosecution evidence was disclosed then and there. If that was true Nirmal possibly could not venture to remain there, however, repentant he might have been. The part played by Nirmal therefore, in our view seems to be somewhat inconsistent with the prosecution story.

15. PW 2 in his evidence has stated that going to the place of occurrence he saw the assaults on Sankar. He is absolutely silent about Monindra being there or Monindra also being assaulted. Learned Advocate for the State submitted that nothing regarding Monindra was put to PW 2 possibly because the assault on Monindra was not the subject matter of the charge. Firstly if Monindra was also assaulted under similar circumstances and in course of the same transaction as alleged we fail to see why that was not also made a subject of the charge. Secondly the contention that PW 2 was not specifically asked about the assault on Monindra because there was no charge regarding Monindra cannot again be accepted for other reasons. If that was the only reason why PW 2 did not speak of the assault on Monindra we fail to see why the father of Monindra was examined to say that Manindra was also assaulted. We also fail to see why the Doctor P.W. 6 was asked about the assault on Monindra. Therefore we are unable to accept the prosecution contention, that the evidence regarding Monindra was purposely withheld as it was irrelevant for the purpose of the charge as against the accused persons. It is not correct to say that no evidence on the point was led and at the same time it is clear that P.W. 2 who claims to be an eye witness does not speak of assault on any other person. The evidence of P.W. 2 is therefore rendered doubtful.

16. As regards the oral dying declaration it may be pointed out that the only disinterested witness, namely P.W. 6 has not said a word about it although the other witnesses claimed that Sankar was asked about it by P.W. 6 and that Sankar gave out the names. P.W. 6 does not say so.

17. In the F.I.R. lodged by P.W. 1 the names of Mukhlal and Bhulu do not appear as being in the group of assailants. In evidence of P.W. 1 has however, implicated both of them and in fact P.W. 2 has runner said that Sankar alleged that he was going to die on account of Mukhlal. The information lodged by P.W. 1 was after she had heard from P.W. 2 as also from the victim. In the evidence a positive and distinct role, more aggressive than that of the others was attributed to Mukhlal and yet his name does not find place in the F.I.R. It is true that F. I R. is a previous statement which can strictly speaking be only used to corroborate or contradict the maker of it. But omission of important facts affecting the probabilities of the case are relevant u/s 11 of the Evidence Act in judging the veracity of the prosecution case (see [Ram Kumar Pandey Vs. State of Madhya Pradesh](#), ). The omission of the part played by Mukhlal in the F.I.R. and the evidence that a major role was attributed to Mukhlal which was known to the informant at the time she lodged the F.I.R. affects not only the credibility of the witness but also the veracity of the entire case.

18. Hence upon a consideration of the entire facts and circumstances we find it difficult to accept the prosecution case as to the manner and circumstances in which the occurrence took place. In such state of evidence the inclusion of the accused persons in an omnibus fashion becomes difficult to accept. At any rate it is unsafe to rely on such omnibus Inclusion of names on their face value.

19. Mr. Podder also contended that in any event the charge with the aid of section 34 against the accused persons is clearly unsustainable, in the absence of evidence of prior concert amongst them. He contended that in such circumstances and in the absence of evidence of a preconcert the accused at the most could be made liable for the individual acts committed by them. In view of the conclusion we have already reached we need not go into this question for in the facts of the case it would be merely academic.

20. For the reasons aforesaid we find that the prosecution has failed to establish the charge against the appellants beyond reasonable doubts. The appeal accordingly succeeds and is hereby allowed. The order of conviction and sentence are set aside and the appellants be released from their bail bonds.

J.N. Chaudhuri, J.

I agree